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Supreme Court of the United States

October Term, 1997

PAUL W. BERGER AND
ERMA R. BERGER,

Cross-Petitioners,

v.

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER AND JACK HAMANN,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Do the media violate the Electronic Communications Privacy Act of 1986 (the Wiretap Act) by surreptitiously recording conversations through a hidden microphone worn by a law enforcement agent who enters a private residence beyond the scope of the search warrant's authority?

2. Are the media entitled to perpetually republish or sell video and audio recordings, or is an injunction appropriate, where there is a final judicial determination that the media unlawfully obtained the video and audio recordings in violation of the Constitution or laws of the United States or any state?

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these related cases.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 49a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, in which it reversed in part and affirmed and remanded in part, the District Court's dismissal of the Bergers' two related civil actions. The Media and Government defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied on February 25, 1998.[1] App. 61a. The Media and Government filed Petitions for Writs of Certiorari which were

[1] The Media cross-respondents are Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper"). The Government cross-respondents are Assistant United States Attorney Kris

both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to file responses to the Petitions until July 27, 1998. This Cross-Petition is pursuant to United States Supreme Court Rule 12.5. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Electronic Communications Privacy Act of 1986, also known as the Wiretap Act (18 U.S.C. §§ 2510, *et seq.*), is involved in part. Sections 2511(1) and (2) provide, in part, that,

> (1) Except as otherwise specifically provided in this chapter any person who

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McLean ("AUSA McLean"), United States Fish & Wildlife Service ("FWS") Special Agents Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell"), and Robert Prieksat ("Prieksat").

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication;

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516,

and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)

* * *

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

STATEMENT OF THE CASE

This Cross-Petition involves a newsgathering subculture formed by an alliance between the Media and the Government who brandish the First and Fourth Amendments as swords, slashing away at individual rights, to jointly create reality-based law enforcement entertainment. The Government wants to publicize its law enforcement efforts and the Media want a sensational story with high ratings and that can deliver a worldwide audience; the Government provides both the storyline, which is usually a criminal investigation, and the stage, which is usually someone's private property. The Government also provides the performers – the individuals under investigation and their innocent family members – who like the Bergers, are exploited as unwitting actors.

This Cross-Petition attacks the Media's use of law enforcement personnel and vehicles to secrete its hidden microphones and cameras, enabling the Media to surreptitiously obtain confidential conversations from private citizens like the Bergers for use as broadcast sound bites. Where, as here, the use of a hidden microphone and camera is not an authorized function of a Government investigation, it is illegal as a matter of law for two reasons. First, a Government Agent is not acting under "color of law" since wearing a hidden microphone for the Media is not a logical or reasonable part of the Agent's job. Second, where the eavesdropping is for the purpose of invading privacy or procuring embarrassing and incriminating statements for broadcast entertainment, the Agent's conduct on behalf of the Media was not by valid consent. Thus, the Media's conduct is an illegal wiretap proscribed by the Wiretap Act.

This Cross-Petition also seeks to establish that the Media may not perpetually broadcast recordings and footage obtained through the Media's violation of the Constitution and laws of the United States and the several states. An injunction in these circumstances is not an unconstitutional prior restraint. After the courts make a final determination that the Media's video and audio recordings were obtained in violation of the Bergers' constitutional or state rights, an injunction would be a lawful suppression of the fruits of the Media's illegal conduct and a constitutional remedy for the wrongs committed. To allow the Media's post-final judgment use of any ill-gotten video or audio recordings would constitute a continuing violation of the Bergers' constitutional rights.

A. Factual Background

In early 1993, the Media contacted Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶ 34-36, 37/A; ER 5/1; ER 2:¶1; ER 6:¶¶18-20; ER 5/7:36:5-25.[2] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television outlets. ER

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[2] Citations are to the excerpts of record ("ER") filed by the Bergers in the CNN Appeal No. 96-35266, to the tab number within the ER and the exhibit within the tab.

1/A; ER 2/A; ER 5/1;[3] ER 1:¶¶34-40; ER 3:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government's express desire to publicize its efforts to enforce environmental laws. ER 5/1, 5/2, 5/8:T11:7-8.[4] A *week later*, a United States Magistrate Judge issued the Search and Seizure Warrants but was never advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize Media cameras and microphones. ER 5/3, 5/4; ER 1:¶¶47-48; ER 3:¶¶25-27. The Search Warrant only authorized a search of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." ER 3:¶28; ER 4:¶7.

By pre-arranged plan, the Media were an integral part of the Government convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 5/8:T6-T7:2.[5] With the Government

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[3] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[4] Mr. Berger was under criminal investigation by AUSA McLean for killing federally-protected eagles as a result of lacing dead livestock carcasses with poison as a means of controlling predatory coyotes. ER 1:¶74; ER 3:¶32; ER 5/8:T11:2-4. References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 5/8.

[5] The Media were also permitted by the Government to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 3:¶¶29-33; ER 5/2, 5/8T1:3-4, T3:1-5, T:1-6. The Media were

Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and mounted one of its cameras on the exterior of another Government vehicle driven by Government Agents. ER 3:¶34; ER 5/8:T6:2-T7:2.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 4:¶¶2-35/8:T7:2. Agent Scrafford told Mr. Berger a search warrant was about to be executed at his Ranch and that the Court had *ordered* a search of *every building*; he was *not told that the residence was excluded*. ER 3:¶36; ER 4:¶¶4, 7; ER 5/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[6] Mr. Berger drove him as requested. ER 4:¶5; ER 5/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. Mr. Berger was shaking and very upset. ER 4:¶17; ER 5/8:102:13-15.[7]

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made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution.

[6] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 5:¶8; ER 5/3, 5/4.

[7] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the

Mr. Berger was never informed that Agent Scrafford was the Media's human "boom mike". Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said solely for the Media's benefit. ER 3:¶37; ER 4:¶¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 3:¶¶37, 38, 41-42; ER 4:¶¶5, 8-13; ER 5/8:T7:1-16. Mr. Berger was never advised of any of his rights, such as the right to remain silent. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16.

Although the Berger residence was excluded from the Search Warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[8] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media through Agent Scrafford's hidden microphone. ER 3:¶48; ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T7:15-16.[9]

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hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 4:¶17.

[8] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 3:¶¶45-46; ER 4:¶¶5-6; 5/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate.

[9] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 4:¶17.

The Government and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 5/8:T8:13. The Bergers were never advised that the Media had entered the Ranch with the aid of the Government and were conducting a private search by videotaping and recording the search on their land and in the various buildings. ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes and were indistinguishable from the law enforcement personnel. ER 4:¶¶11, 12; ER 5/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 4:¶¶5, 10; ER 8/8:T8:13.

Government Agents helped the Media set up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 5/5, 5/2, 5/8:T11:2-8.[10] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 5/2, 5/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted

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[10] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made personal and disparaging remarks about Mr. Berger.

only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles. The segment was broadcast on CNN and Turner channels nationally and internationally at least ten (10) times through April 1994. ER 5/8T12:1-3; 5/9:4. It may still be on the air somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government in the United States District Court in Montana under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law (trespass, conversion and intentional infliction of emotional distress) and for declaratory and injunctive relief and monetary damages.[11] The Bergers principally alleged that (1) the Government Agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the Media in their search for dramatic material, and (2) the Media acted sufficiently in concert with the Government to be held accountable for that violation as Government actors. On February 26, 1996, after only nominal discovery was allowed, the District Court entered an order and final judgment granting summary judgment on all counts of the Complaint in favor of the

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[11] The Bergers initially sued CNN and Hamann on March 21, 1994, filed the First Amended Complaint in April 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995 naming all of the Media and Government parties herein.

Media and Government. District Court jurisdiction was pursuant to 28 U.S.C. §§ 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under 28 U.S.C. § 1291. As to the questions presented in this Cross-Petition and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the Media-Government foray onto their private Ranch. In sum, the Court of Appeals declared:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-10a.

As to the Government Agents' conduct, the Ninth Circuit reversed the District Court and held that the Agents violated the Bergers' Fourth Amendment privacy rights. App. 10a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) ("clearly established" test for determining constitutional violation and qualified immunity). The court concluded that the agents were not protected from

suit by qualified immunity because "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." App. 11a (citing *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995); and 18 U.S.C. § 3105 (which prohibits "any persons, other than law enforcement personnel and those assisting them from executing search warrants"). The Ninth Circuit found further support for this view in observing that,

> no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

App. 11a-12a.

As to the Media, the Ninth Circuit also reversed the District Court and held that the Media's conduct with the Government amounted to state action for purposes of constitutional liability. App. 19a. Under the "joint action" test, the Ninth Circuit stated that it is satisfied and the United States "Supreme Court has said is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a Government actor and a private party [citation omitted.]" App. 18a; *see Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). The Court of Appeals noted that,

> [i]n this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the

> government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

App. 19a.

The Ninth Circuit also declared that the Media were not mere "passive observers" as they prefer to characterize themselves. The Court of Appeals observed that the press in the older, lower court decisions relied on by the Media were different from the "active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a. "In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the Media that occurred in this case." App. 12a.

The Ninth Circuit further held that the Media's use of the hidden microphone was unlawful eavesdropping and violated the Bergers' privacy "because the surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a. In rejecting the Media's reliance on

the "invited informer" doctrine, the court held that the doctrine does not shield the press where, as here, "law enforcement authority was used to assist commercial television, not to further law enforcement objectives." App. 16a. The court noted that the Media acknowledged that the Berger residence was outside the scope of the warrant and that the Bergers did not consent to the microphone's entry into the home. App. 14a. In support of its ruling the court cited *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), to reiterate that

> [w]e recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests.

App. 16a.

Ironically, while concluding that the Media's eavesdropping was "not done for a legitimate law enforcement purpose," the Ninth Circuit, like the District Court, disregarded the legitimate law enforcement purpose requirement of the "color of law" element of the Wiretap Act and held that the Media's eavesdropping was not unlawful under that act. This conclusion is illogical and in conflict with the Seventh Circuit's reasoned analyses of the exceptions to the Wiretap Act in *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993).

The Ninth Circuit also affirmed dismissal of the Bergers' injunction cause of action as a prior restraint. App. 25a. In this regard, the Bergers' complaint alleged two conjunctive causes of action, for declaratory relief and injunction. Federal Rule of Civil Procedure 54. What

the Bergers seek is a declaration that the Media's method of obtaining their images and recordings was unlawful, indeed unconstitutional; once determined, the Bergers would then ask that the Media be enjoined from the perpetual future use of the images and recordings which were unlawfully obtained. The Bergers submit that enjoining the use of the fruits of unlawfully obtained and confidential information is not an unconstitutional prior restraint.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Cross-Petition should be granted because the Ninth Circuit's opinion on the issue of "color of law" under the Wiretap Act decided an important question of federal law, in conflict with the Seventh Circuit in *Thomas*, that has not been, but should be, settled by this Court. This Cross-Petition should also be granted because the Ninth Circuit's opinion on the issue of an injunction as a prior restraint raises an important and unsettled question of federal law regarding the Media's attempt to benefit from the disclosure and use of unlawfully acquired information that has not been, but should be, settled by this Court.

I. THE MEDIA VIOLATED THE WIRETAP ACT WHEN THEY ENTERED THE BERGERS' PRIVATE RANCH AND RESIDENCE BY INSTALLING A HIDDEN MICROPHONE ON A GOVERNMENT AGENT TO SURREPTITIOUSLY RECORD PRIVATE CONVERSATIONS

The Wiretap Act was enacted in 1968 and amended in 1986 to prohibit all interceptions of wire and oral communications except as expressly authorized in the statutes.

18 U.S.C. §§ 2510-2520. The Ninth Circuit violated the spirit and intent of the Wiretap Act when it ruled that the Media unlawfully eavesdropped on the Bergers, but turned a blind eye and excused the Media under the Wiretap Act. According to Congress' articulated purpose for the Wiretap Act, the Media's eavesdropping venture with the Government was unlawful:

> Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order. . . .

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

To approve the Ninth Circuit's holding on the wiretap issue would defy Congress' intent that the protection of privacy under the Wiretap Act be more extensive than the Fourth Amendment constitutional standards set forth by this Court in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). *Id.* Indeed, to condone the Ninth Circuit's holding would defy this Court's own view that,

> [u]nauthorized interceptions and the disclosure and use of information obtained through the unauthorized interception are crimes . . . and the victim of such interception, disclosure or use is entitled to recover civil damages.

Gelbard v. United States, 408 U.S. 41, 46 (1972); *see* 18 U.S.C. § 2520 (disclosure and use of the contents of intercepted communications subject to same sanctions as interception itself).

Here, the Ninth Circuit ruled that the Media's use of a hidden microphone was invasive eavesdropping and

not protected by the Media's defensive use of the "invited informer" doctrine. App. 15a. Yet, disregarding its well-reasoned analysis on that issue, the Ninth Circuit inconsistently ruled that both the Media and Government "were acting under the authority of a search warrant" for purposes of the liability exception to the Wiretap Act. App. 22a. The court determined that because Agent Scrafford consented to wear the Media microphone when he induced the Bergers to converse, it was sufficient to apply the one consent exception of Section 2511(2)(c). *Id.* The District Court had decided the issue on other grounds, the second exception to liability, Section 2511(2)(d). The District Court held that the Media's conduct was not under "color of law" but was shielded by the consent of a federal agent. The District Court also erroneously held that wiretaps for commercial purposes are neither criminal nor tortious. App. 41a-42a. Both decisions below were incorrect determinations of an important question of federal law.

A. Agent Scrafford was acting as a human "boom mike" for the Media and not an Agent authorized under "color of law"

The Government did not obtain the required court order to wiretap the Bergers for law enforcement purposes and, thus, Agent Scrafford was not acting under "color of law" when he donned the Media's hidden microphone. The Ninth Circuit acknowledged that the scope of the "color of law" requirement under Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) and *Bivens* is different than the scope of the "color of law" requirement for the Wiretap Act. App. 21a. Although the

Ninth Circuit cited *Thomas*, 998 F.2d at 450-51, it disregarded the Seventh Circuit's careful analysis of the narrow reading of "color of law" under the Wiretap Act.

As the *Thomas* court observed, the Civil Rights Act, unlike the Wiretap Act, is a remedial statute intended to be as broad as the Fourteenth Amendment, under which "the Supreme Court has narrowed (if not completely eliminated) the immunity enjoyed by Government officials in favor of individuals who have been allegedly harmed by the state." *Id.* at 451. As to the Wiretap Act, the *Thomas* court added,

> [c]ontrast this with the wiretapping act where color of law is used not to create a cause of action for injured plaintiffs but to exempt certain state officials from liability for their behavior. In this context, the broadest reading of color of law would hinder, rather than further the essential purpose of the act: to protect individuals from invasions of privacy.

Id. As the Seventh Circuit in *Thomas* made clear, for a wiretap to be under "color of law" for purposes of § 2511,

> there must be some logical and reasonable connection between the government worker's job description and eavesdropping.

Id.

There was no logical and reasonable connection found in *Thomas*, when Pearl, a basketball coach at a state university, was sued by Thomas for violating the Wiretap Act when he surreptitiously tape recorded their telephone conversations while attempting to recruit Thomas. *Id.* at 449. The District Court had ruled that Pearl did not

violate the Wiretap Act under § 2511(2)(c) because he acted under "color of law" as a state employee and was a party who consented to the conversation. *Id.* at 449-50. The Seventh Circuit agreed that Pearl did not violate the Wiretap Act but for a different reason. *Id.* at 451.

While stating that as a state employee, Pearl would have been acting under "color of law" if Thomas sued him for civil rights violations under § 1983 (*Id.* at 450), the Seventh Circuit held that Pearl was *not* acting under "color of law" under the Wiretap Act because there was no logical and reasonable connection between Pearl's job and the eavesdropping. The court noted that "[w]e do not expect college administrators and athletic directors to wiretap, or sanction wiretaps, any more than basketball coaches." *Id.* at 451. Thus, the exception of § 2511(2)(c) did not apply. However, the Seventh Circuit also held that the second exception under § 2511(2)(d) did apply, in which an unlawful wiretap would not be excused if done for the purpose of committing a crime or tort, because Thomas did not allege any tort other than a wiretap violation alone. *Id.* In contrast, the Bergers separately allege that the wiretap was done for the purpose of committing criminal or tortious acts. *See Thomas*, 998 F.2d at 451; *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995).

As though anticipating that another court might apply an inappropriately broad reading of "color of law" in the wiretap context, the *Thomas* court issued the following admonition:

> [a]lso, if "color of law" means the same thing in § 2511 that it means in § 1983, police officers

> who secretly taped conversations without a warrant or the approval of their superiors would be free from criminal and civil liability. That cannot be what Congress intended.

Id. That is what occurred here.

B. The Media's recording was not for any legitimate law enforcement purpose but to criminally and tortiously violate the Bergers' rights

The Media's recording of the conversations of Mr. and Mrs. Berger with the federal Agents was not made to meet the legitimate needs of law enforcement, but in order to criminally and tortiously violate their rights.

It was Congress' intent from the time the § 2511 exceptions were added that their purpose was only to protect the "legitimate needs of law enforcement" and to "allow private persons to use the technique for lawful purposes." 114 Cong. Rec. 14720-21 (1968) (Justice Department comments).[12]

Contrary to the Ninth Circuit's ruling, the facts show that the Government and Media were not acting under "color of law." The Media's wiretap was not for any legitimate law enforcement purpose, or lawful purpose,

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[12] According to the Department of Justice, "[t]he present amendment is designed to prohibit the flagrant abuses that exist with respect to the practices of consensual wire tapping and eavesdropping, so at the same time to allow private persons to use the technique for lawful purposes. *The amendment places no restrictions on law enforcement officers acting in the ordinary course of their duties. . . .*" *Id.*

and was not logically and reasonably related to Agent Scrafford's job. The Ninth Circuit held that the "surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a.

The Government neither applied for nor obtained court authority to wiretap the Bergers even though it obtained the Search and Seizure Warrants because it knew or should have known that the Media's wiretap was illegal. 18 U.S.C. § 2518 (request for authority to obtain wiretap, like search warrant, must be in writing). The Media even conceded that the Berger residence was outside the scope of the warrant and that the Bergers did not consent to the microphone's entry into the home. App. 14a.

Agent Scrafford was simply a piece of recording equipment, a human "boom mike", who wore the Media's microphone and allowed the Media to obtain the Bergers' confidential statements. There was no logical and reasonable connection to Agent Scrafford's job, lawfully executing the Search Warrant. The Ninth Circuit even ruled that "law enforcement authority was used to assist commercial television, not to further law enforcement objectives." App. 16a. Any "consent" by Agent Scrafford or any other Agents was vitiated by their illegal presence in the Berger residence and failure to obtain a warrant for the wiretap. There is simply no logical or reasonable connection between the facts presented and the Ninth Circuit's decision. A direct conflict is created with the "color of law" analysis set forth in *Thomas*.

The Media are not protected by the second exception to liability under § 2511(2)(d). Here, the Media's eavesdropping was done "for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state" as the Ninth Circuit held. 18 U.S.C. § 2511(2)(d). Section 2511(2)(d) provides no defense.

Each broadcast of illegally obtained video and audio recordings constitutes a new, separate invasion of the Bergers' privacy, infliction of emotional distress, and a further violation of their Fourth Amendment rights. The Sixth Circuit considered this issue in *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), in noting that what is implicit under the Wiretap Act is that what is not expressly permitted is forbidden and,

> [i]t seems beyond doubt that the release of *unlawfully* obtained wiretap material to any third party under the circumstances presented by this case is clearly banned by the Act.

(emphasis added) *Id.* at 401-402; *see Oziel v. Superior Court (CBS Inc.)*, 223 Cal.App.3d 1284, 1302 (1990) (each viewing of videotape of execution of search warrant constitutes a separate illegal search); *see also* Montana Constitution, Art. II, § 10; *State v. Bullock*, 901 P.2d 61 (Mont. 1995) (Montana's constitutional right of privacy is even broader than under the Federal Constitution).

The Bergers should not suffer the consequences of the Media's unlawful wiretap. While a person who allows another into his home or office takes the risk that the visitor may not be what he seems,

> he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modem world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man.

App. 16a-17a (quoting *Dietemann*, 449 F.2d at 249).

II. THE MEDIA SHOULD NOT BENEFIT IN PERPETUITY FROM THE FRUITS OF NEWSGATHERING PRACTICES THAT VIOLATE THE CONSTITUTION

The Ninth Circuit erroneously concluded that even though the Media's joint venture with the Government violated the Bergers' constitutional rights and resulted in triable claims for damages, an injunction to prevent perpetual victimization is prohibited by the Constitution. App. 25a. The Bergers submit that an injunction against further broadcast or sale of the video and audio recordings of the search would not violate the Constitution's prohibition on prior restraint because the Media would have been afforded a full and fair opportunity to litigate the legitimacy of its conduct. Following a final judgment that the Media's method of obtaining the video and audio recordings of the Berger search violates the Constitution, there should be no bar to prevention of publication.

In refusing to authorize an eventual prohibition of the Media from using the fruits of its unlawful newsgathering, the Ninth Circuit raises an important question of federal law which is ripe for this Court to decide.

Previously and in other contexts, this Court has expressly reserved the question whether the Government, in cases where information has been acquired unlawfully by a newspaper or by a source, may ever punish not only the unlawful acquisition, but the ensuing publication as well. *Florida Star v. B.J.F.*, 491 U.S. 524, 533-36 (1989).

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973), Justice Powell stated: "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." As in *Pittsburgh Press*, the Berger's request for an injunction would not endanger arguably protected speech; "[b]ecause the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication." *Id.* Here, the Bergers would seek a final determination of the unlawfulness of the Media's newsgathering practices. An injunction after this determination is appropriate.

The doctrine of prior restraint on the press is derived from the "dominant purpose of the First Amendment . . . [to foster] [o]pen debate and discussion of public issues. . . . " *New York Times Co. v. United States*, 403 U.S. 713, 723-724 (1971). The purpose is not to reward criminal, tortious and unconstitutional conduct. Denial of the Bergers' injunction request permits the Media to be free to cause or threaten further emotional harm to the Bergers at any time in the future, even after a final judgment defining the illegality of their conduct. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (injunction

warranted where proof shows sufficient likelihood of irreparable injury); *Galella v. Onassis*, 487 F.2d 986, 994-995 (2d Cir. 1973) (defendant photographer enjoined from taking any action that would harass, alarm or frighten Mrs. Onassis or her children).

The violation of the Fourth Amendment empowers the courts to enjoin further action by the Media. Justice Harlan's concurrence in *Bivens*, the basis for the Bergers' suit, noted that a court's power to enjoin invasions of constitutionally protected interests derives directly from the Constitution. *Bivens*, 403 U.S. at 404 n.5. In Harlan's words, the judiciary "has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. . . . " *Id.* at 407.

CONCLUSION

When the Media execute a written contract with the Government, trespass on private property, use Government Agents to perform and stage video and audio recordings of the search of private property, and install a hidden microphone on a Government Agent to surreptitiously obtain private sound bites inside a private home excluded from the search warrant, the Media are engaged in illegal wiretapping. The repeated broadcast of the proceeds of this unconstitutional and illegal conduct is appropriate to be enjoined. The Ninth Circuit decided important questions of law that have not been, but now should be, settled by this Court.

For the reasons set forth in this Cross-Petition, the Bergers respectfully request that if the Media's Petition for Writ of Certiorari is granted, that this Cross-Petition be granted as well.

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